

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 09-0651

JERALD DAVIS COCKRELL,

Petitioner and Appellant,

-vs-

STATE OF MONTANA, DEPARTMENT OF JUSTICE,
DRIVER'S LICENSE BUREAU,

Respondent and Appellee.

APPELLANT'S BRIEF

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY, HONORABLE JAMES A. HAYNES, PRESIDING

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ISSUE PRESENTED ON APPEAL

1. WAS IT ERROR FOR THE DISTRICT COURT TO CONCLUDE AS A MATTER OF LAW THAT SUFFICIENT ARTICULABLE, OBJECTIVE DATA WAS SHOWN AT HEARING TO JUSTIFY A STOP OF APPELLANT'S VEHICLE?

STANDARD OF REVIEW

This Court reviews a district court finding that an officer had particularized suspicion to justify an investigatory stop for error and whether the court correctly applied that finding as a matter of law. *State v. Luckett*, 2007 MT 47, ¶ 6, 336 Mont. 140, 152 P.3d 1279.

STATEMENT OF THE CASE

Jerald Cockrell (Cockrell), the Appellant, was charged with the offense of driving under the influence of alcohol, first offense, on July 18, 2009. Cockrell had exited a parking space on Main Street in Stevensville, Montana and was stopped by Stevensville Police Officer Joshua Ray for what Officer Ray determined to be driving offenses as Cockrell proceeded from the parking area toward his residence. Following the initial stop, Officer Ray conducted an investigation that led to the citations for DUI and careless driving. Cockrell refused to submit to a testing of his breath at the scene of the stop and later declined to submit to a blood draw for testing of his blood-alcohol concentration.

Cockrell entered pleas of not guilty to both offenses July 21, 2009 in the

Stevensville Town Court. Cockrell, through his former counsel, filed a petition with the district court challenging the legality of the stop that resulted in his arrest. Upon request of counsel, Cockrell's license to drive was reinstated pending the outcome of a hearing on the petition. Cockrell was granted a continuance of his first trial date until after the hearing on the license seizure and particularized suspicion to stop the Cockrell vehicle and conduct further investigation.

Hearing was held in the district court October 21, 2009. The district court entered its order denying reinstatement of Cockrell's driving privileges December 8, 2009 and this appeal followed.

STATEMENT OF FACTS

Cockrell backed out of an angled parking space on Main Street in Stevensville, Montana, July 18, 2009, at approximately 11:30 p.m. and proceeded to the four-way stop sign at Main and Third Streets. Stevensville Police Officer Joshua Ray pulled behind Mr. Cockrell and, according to his testimony, observed Mr. Cockrell as the vehicle approached the stop sign. Tr., 10-21-09, p. 4, l. 12-22. Officer Ray reported further that Mr. Cockrell's vehicle came to a complete stop, signaled a turn to the right and proceeded to turn at the intersection of Main Street and Third Street. Tr., 10-21-09, p. 5, l. 1-8. Officer Ray reported that he observed Mr. Cockrell's vehicle make a wide turn, which was wide enough to cause the

vehicle to “touch the lines of the parking spaces on the North side of Valley Drug store”. Exhibit B, attached, p.1. At hearing, Officer Ray admitted there were no lines delineating parking spaces where he reported them to be. Tr., 10-21-09, p. 16, l. 1-10. Officer Ray also agreed there were no center lines on the roads in question for the hearing. Id., l. 11. At hearing, under direct examination by Town of Stevensville Attorney Jeffrey B. Hays, Officer Ray departed from his Case Notes by testifying the Cockrell vehicle turned wide onto Third Street from Main Street, turning into the opposing lane of travel, then correcting into the correct lane, Tr. 10-21-09, p. 5, l. 5-8.

According to Officer Ray’s Case Notes and testimony, Mr. Cockrell then turned south onto Mission Street after coming to a complete stop in the middle of the intersection of West Fourth Street and Mission Street. Officer Ray testified at hearing that the Cockrell vehicle turned wide again, nearly touching the dirt and grass. Tr., 10-21-09, p. 5, l. 9-14. The officer stated in his report that the Cockrell vehicle then continued to the intersection of Ravalli and Missions Streets, where the vehicle stopped in the middle of the intersection. Id., l. 15-24. (The intersections of West Fourth Street and Mission Street, as well as Ravalli Street and Mission Street have “yield” signs that would instruct Mr. Cockrell to yield to other traffic as the vehicle proceeded through the intersection.) Thereafter, the vehicle

turned west onto Ravalli Street, and as it turned, Officer Ray reported he observed the vehicle turn wide and come within inches of touching the grass on the south side of the road. Exhibit B and Tr., 10-21-09, p. 6, l. 1-5. Officer Ray then initiated a stop of the Cockrell vehicle and subsequently conducted a DUI investigation. Mr. Cockrell was cited with DUI and Careless Driving, and his driver's license was seized and a temporary permit was issued.

Officer Ray admitted at hearing that it is not illegal to stop at a yield sign, but made note of such driving in his report. Exhibit B, Tr. 10-21-09, p. 17, l. 17-25. None of the side streets in this area of Stevensville are marked with center lines or other markings, including what are commonly referred to as "fog lines". Tr., 10-21-09, p. 18, l. 7-21.

William J. Buzzell, (Buzzell), a private investigator, former peace officer, former Undersheriff for Ravalli County and former State adult probation officer, took photographs of the route driven by Cockrell and testified at hearing concerning the roadways. Those photographs were entered into evidence as Petitioner's Exhibit A at the hearing challenging the seizure of Cockrell's license and will be referred to here as Exhibit A.

Buzzell testified that the streets traveled by Cockrell are very narrow and the intersections Cockrell drove through have various obstructions that limit visibility,

explaining why Cockrell stopped at those intersections instead of just “yielding”.

Tr., 10-21-09, pp. 30-33. The asphalt roads abut private property and lawns.

Buzzell testified that it was apparent that it is common for drivers to turn wide on these roads, as shown by tire marks and grass being eroded away by drivers touching the lawns as they turn. Tr., p. 33, l. 19-22. Buzzell testified that the streets are so narrow there is little room to maneuver if a person met a vehicle coming from the opposite direction and that the wide turns alleged are not unusual. Tr., 10-21-09, p. 37, l. 4-10; p. 39, l. 10-17.

Cockrell testified that he was driving normally, being cautious, and that his observations over time indicate that most drivers make wide turns out of necessity because the streets are so narrow. Tr., 10-21-09, p. 44, l. 14-23.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the district court and reinstate Cockrell’s driving privileges based upon a lack of required particularized suspicion for Officer Ray to conduct an investigatory stop. Officer Ray did not have sufficient articulable, objective data from which to form a particularized suspicion. His reported observations of driving errors were based on subjective observations because his reasons for making the stop included crossing over non-existent road markings and other observations that were simply common driving practices for the

roads involved.

The first “observation” was that Cockrell, after making a complete stop, made a wide turn to the right, touching the lines of the parking spaces at Valley Drug. There are no lines marking parking spaces at Valley Drug, which then places Officer Ray in the position of guessing where those lines might have been. The same is true for the turn west onto Ravalli Street, where Officer Ray reported that Cockrell turned wide, almost touching the grass on the south side of the road. Credible testimony at hearing indicated that it is next to impossible to turn entirely within one’s lane of traffic on the narrow side streets of this area of Stevensville. Officer Ray did not find it necessary to stop Cockrell’s vehicle after the first wide turn or after Cockrell stopped in the middle of intersections that were marked with “yield” signs. There is no lighting on the streets Cockrell traveled, yet Officer Ray maintains he could see well enough from behind Cockrell’s vehicle to see his right side tires nearly touch grass, and his left side tires cross over the center of an unmarked road. Cockrell was cited for DUI and careless driving, but there is no explanation of what constituted careless driving in Officer Ray’s report or from the testimony at hearing.

Officer Ray’s observations are subjective, rather than objective because he had to guess where parking space lines might have been, where the center of the

road was and where the road extended to the side as the road melds into private property. There was simply insufficient objective data from which Officer Ray could determine there was a justifiable reason to conduct an investigatory stop on the Cockrell vehicle.

ARGUMENT

The sole issue before this Court is whether there existed a particularized suspicion, based on the totality of the circumstances, that would allow Officer Ray to conduct an investigatory stop on the Cockrell vehicle. The issue here involves two reportedly “wide” turns made by Cockrell and no other allegedly illegal or improper driving. There was no speeding, no swerving and no other indications of impaired driving.

The Fourth Amendment to the United States Constitution and Article II, § 11 of the Montana Constitution protect persons against unreasonable searches and seizures, including brief investigatory stops of vehicles. *State v. Loiselle*, 2001 MT 174, ¶ 6, 306 Mont. 166, 30 P.3d 1097. A finding is clearly erroneous if it is not supported by substantial evidence, the court has clearly misapprehended the effect of the evidence, or this Court is left with a definite and firm conviction that the district court made a mistake. *State v. Gilder*, 1999 MT 207, ¶ 7, 295 Mont. 483, 985 P.2d 147.

This Court has held that an officer must have a particularized and objective basis for suspecting a person of criminal activity before conducting an investigatory stop. *Loiselle*, ¶ 7. In 1981, this Court adopted a two-part test set forth in *U.S. v. Cortez*, 449 U.S. 411, 101 S.Ct. 690 (1981), to determine whether a police officer had a particularized suspicion to make an investigatory stop. *State v. Gopher*, 193 Mont. 189, 631 P.2d 293 (1981). In *Gopher*, this Court stated that in order to demonstrate the existence of particularized suspicion, the State must show: (1) objective data from which an experienced officer can make inferences; and, (2) a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity. 193 Mont. at 194, 631 P.2d at 296, Mont. Code Ann. § 45-5-401(1). In addition, this Court has held that a determination of whether a particularized suspicion of wrongdoing exists is a question of fact that depends on the totality of the circumstances. *State v. Lafferty*, 1998 MT 247, ¶ 10, 291 Mont. 157, 967 P.2d 363.

In deciding whether a Montana citizen should have driving privileges restored after those privileges have been denied in connection with a DUI investigatory stop, a court is limited by statutory mandates. Mont. Code Ann. § 61-8-403(4) limits a court to deciding; (I) a peace officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a

vehicle upon ways of this State open to the public while under the influence of alcohol, drugs, or a combination of the two, and the person was placed under arrest for violation of Mont. Code Ann. § 61-8-401, and (iv), whether the person refused to submit to one or more tests designated by the officer. In the case at bar, (iv) above is not relevant to the proceedings because Cockrell has admitted he refused testing. This Court has determined that the “reasonable grounds” requirement of the statute is equivalent to “particularized suspicion”. *Brewer v. State*, 2004 MT 193, ¶ 5, 322 Mont. 225, 95 P.3d 163. Recently, this Court has determined that in order to obtain a particularized suspicion that justifies an investigatory stop, the peace officer must be possessed of: (1) objective data and articulable facts from which he or she can make certain reasonable inferences, and, (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense.

Brown v. State, 2009 MT 64, ¶ 20, ___ Mont. ___, ___ P.3d ___.

With regard to the totality of the circumstances, this Court has held that one isolated observation is likely not sufficient to reach a particularized suspicion of wrongdoing, but that an inference can be drawn from several observations that, when taken together, indicated possible criminal activity. *Clark ex rel. Driver Improvement Bureau*, 2005 MT 65, ¶ 9, 326 Mont. 278, 109 P.3d 244.

When the applicable law, as stated above, is applied to this case, this Court should find that Officer Ray did not have sufficient articulable facts and objective data to form the required particularized suspicion that Cockrell had committed, was committing or was about to commit an offense. Officer Ray states in Exhibit B, his Case Notes, that Cockrell straddled the white line as he approached the stop sign at Main Street and Third Street in Stevensville. That alleged driving is unfortunately not captured on the tape entered as evidence by the Town of Stevensville. When questioned about that driving observation, Officer Ray seemed confused and stated that he thought the front of Cockrell's vehicle was across the white line. Officer Ray was apparently referring to the white line at the crosswalk, not the white line designating the driving lane. Tr., 10-21-09, p. 15, l. 2-14.

Officer Ray next reported in Exhibit B that Cockrell made a complete stop at the stop sign, signaled his turn and proceeded to turn right. Then, Officer Ray reports in Exhibit B that Cockrell made a turn "wide enough to touch the lines of the parking spaces on the North side of Valley Drug store". Exhibit B. As the officer later agreed, there are no lines denoting parking spaces at Valley Drug Store. Because there are no lines, Officer Ray had to make a determination, in the dark, while he is activating his tape recorder and stopping his vehicle at the stop sign, that Cockrell turned wide enough to touch the lines if there had been lines to

touch. His observation, then, becomes subjective to his guess as to where the lines might have been and there was no objective data from which he could determine the placement of the lines. This Court is referred to Petitioner's Exhibit A from the 10-21-09 hearing for a compilation of photographs showing the parking area of Valley Drug Store. Cockrell testified that he approached the intersection in a normal, safe manner and that he did not recall going over the "fog line" or making a wide turn. Tr., 10-21-09, p. 2, l. 8-10; p. 43, l. 6-19.

This Court has held that minor deviations from "perfect driving" do not justify a warrantless stop of a vehicle. In both *Morris v. State*, 2001 MT 13, 304 Mont. 114, 18 P.3d 1003, and *State v. Lafferty*, 1998 MT 247, 291 Mont. 157, 967 P.3d 363, this Court found driving on and over traffic lines was insufficient to create a particularized suspicion of wrongdoing. In those two cases, peace officers observed a driver crossing over and driving on traffic lines and at least had some objective data that the driver had actually crossed over or onto a traffic lane demarcation. Here, Officer Ray had to estimate where the parking space lines might have been, where the center line of any of the roadways was and where the edge of the road was without any markings. In short, Officer Ray estimated the particularized suspicion without any substantial, objective data from which to make that determination. Officer Ray reported no instances of Cockrell weaving or

speeding or failing to signal a turn. He merely estimates that in his opinion, Cockrell made a couple of wide turns. As previously discussed, these streets are so narrow that there is barely room for two vehicles to pass when meeting from opposite directions.

When evaluating the totality of the circumstances, a court considers the quantity or content of the information available to the officer and the quality of, or degree of, reliability of that information. *State v. Elison*, 2000 MT 288, ¶ 16, 302 Mont. 228, 14 P.3d 456. Here, the quantity of evidence involves Cockrell making two wide turns on very narrow roads, with an officer observing from behind, in the dark. The quality and reliability of Officer Ray's observation are in question. He states that Cockrell turned so wide he touched the lines marking parking spaces at Valley Drug Store when there are no markings. He states that Cockrell nearly touched the grass on the second turn in question. Common sense dictates that Officer Ray had to guess where the tires actually were on the road as Cockrell turned right and Officer Ray was behind him. As the vehicle turned right, Officer Ray would have been precluded from seeing the tires on the left hand side of Cockrell's vehicle. Officer Ray would also be precluded from seeing the tires of the Cockrell vehicle when the vehicle turned right. Officer Ray's observations that Cockrell drove into a lane of traffic not his own are suspect. The district court

found that Cockrell did drive into the opposite lane of traffic and cited Mont. Code Ann. § 61-8-321 in support of its finding that Cockrell made two wide turns. Order Denying License Reinstatement Petition, p. 5. That statute clearly states that: (1) Upon all roadways of sufficient width, a vehicle must be operated upon the right half of the roadway, Officer Ray made subjective findings as to where the right half of the roadway might be because there are no markings of any kind on the streets here involved. Both Mr. Buzzell and Cockrell testified that it is nearly impossible to make a turn from one of the streets onto another without turning wide. Tr., 10-21-09, p. 37, l. 1-9; p. 39, l. 9-17; p. 44, l. 14-21.

CONCLUSION

When the totality of the circumstances do not support a particularized suspicion of wrongdoing, this Court has held the stop to be unjustified. *State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542, (1995). In *Reynolds*, the arresting officer observed a vehicle waiting at an intersection for 7-10 seconds and proceeding through the intersection at a speed bordering on traveling too fast. There, the Court found that, under the totality of the circumstances and facts in the case, the possible traffic infraction combined with no other objective data, did not support a finding of a particularized suspicion to stop Reynolds. Officer Ray testified that stopping at a yield sign is not a traffic infraction and the only other

observations were the alleged wide turns. Wide turns are part of normal driving on these streets in Stevensville because of the physical makeup of the street system. It was Officer Ray's subjective perceptions that precipitated the stop on Cockrell's vehicle; not articulable, objective data from which he could make a determination of particularized suspicion. As is becoming more frequent, law enforcement officers cruise areas where bars and casinos are located and wait to find the barest of reasons to pull someone over and conduct further investigation. This Court should not condone such pretextual stops and should reverse the finding below.

RESPECTFULLY SUBMITTED this 1st day of February, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPELLANT'S BRIEF was served on the State and the Town of Stevensville February, 2010, by placing same in the U.S. mail, postage prepaid and addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedures, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word Perfect 11 for Windows, is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 1st day of February, 2010.

David E. Stenerson,
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